

The Role of Contribution among Defendants in Private Antitrust Litigation

June 2008

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CCP Policy Briefings

BACKGROUND

- The latest push at the EU-level for more private enforcement of competition law has generated a renewed interest in understanding how private enforcement works. With hard core cartels singled out by the majority of enforcement agencies as the worst form of infringement, it is of particular interest to understand what private enforcement can deliver in these cases.
- Anticompetitive agreements to collude on prices or quantities imply multiple defendants, all of whom have been engaged in a violation of competition law. To ease the burden on private plaintiffs, such co-defendants have typically been made jointly and severally liable, ensuring that the plaintiff need only sue one of the defendants.
- At issue is whether the defendant, who has been ordered to pay the damages caused collectively by all the defendants, can ask for a contribution from the co-defendants. The answer appears to differ between the US, where the rule is explicitly one of no contribution, and the majority of EU member states, where the most likely rule is that there is scope for contribution.
- To date, the experience of the incidence of private actions for damages in antitrust cases has differed markedly across jurisdictions. The procedural rules surrounding private litigation may account for some of these differences.

METHODOLOGY

- The authors proffer a model of an industry with N firms who, depending on the law and procedures, may decide to form a cartel. The base model assumes that only one cartel member can get immunity from public prosecution and that such a firm cannot have been a ringleader. Where a cartel is uncovered, members are assumed to be jointly and severally liable. The authors build on this model to explore the effect of the different rules concerning contribution.
- The authors explore the interaction between private and public and private enforcement in order to comment on the extent to which private enforcement should be encouraged.

KEY FINDINGS

- The no-contribution rule has a number of benefits over the contribution rule. One previously identified benefit is that the total settlement is

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higher, which helps to deter cartel activity by increasing the penalty on cartel members if they are caught.

- Another effect of the no-contribution rule identified in this research is that defendants are willing to reveal compromising information in return for a reduced level of damages. The extra information made available increases the total liability of the cartel and, hence, also leads to an increase in deterrence.
- However, the no-contribution rule, by its side effect of introducing a private leniency programme, also has the potential to neuter any public leniency programme, thereby possibly reducing the number of cartels detected.
- Adopting a contribution rule may lead to under-deterrence. The choice between the two rules is hence not clear-cut.

POLICY ISSUES

- The design of the legal system can have quite subtle but substantial effects on the ability of the law to deter cartel behaviour.
- It may be the case that joint and several liability and no-contribution is incompatible with a successful public leniency programme.
- More generally, to design appropriate procedural rules for private enforcement we need both to understand how these interact and how private enforcement interacts with public enforcement.

THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

FOR MORE INFORMATION

The full working paper (CCP Working Paper 08-3) and more information about CCP and its research is available from our website: www.ccp.uea.ac.uk

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